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COURT OF APPEALS
DIVISION ONE
OCT 04 2006

NO. 57491-4

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

Community Telecable of Seattle, Inc., Comcast of Washington I,
Inc., and Comcast of Washington IV, Inc.,

Respondents,

v.

City of Seattle,

Appellant.

Respondents' Statement of Additional Authorities

Randy Gainer, WSBA No. 11823
Dirk Giseburt, WSBA No. 13949
Davis Wright Tremaine LLP
Attorneys for Respondents

2600 Century Square
1504 Fourth Avenue
Seattle, Washington 98101-1688
(206) 622-3150 Phone
(206) 628-7699 Fax

With respect to the material on pages 13-14 of Appellant's Opening Brief and on pages 9-11 of the Reply Brief of Appellant, Respondents ("Comcast") refer the Court to the following additional authorities:

Valley View Industrial Park v. City of Redmond, 107 Wn.2d 621, 633, 733 P.2d 182, 190 (1987) ("The nature of Valley View's constitutional taking claim rendered the exhaustion [of administrative remedies] requirement inapplicable."); *Orion Corp. v. State*, 103 Wn.2d 441, 458, 460, 693 P.2d 1369, 1379-80 (1985) ("If the available administrative remedies are inadequate . . . they need not be pursued before judicial relief is sought. . . . [T]he State and the County had made a policy choice to prevent the development of Padilla Bay. . . . [A]ny permit application [was] a vain and useless act."); and *Nolte v. City of Olympia*, 96 Wn. App. 944, 957, 982 P.2d 659, 666-67 (1999) (developer had no remedy before City because the City would have adhered to its ordinance, which was found to be without statutory authority). *Cf. FDIC v. Dixon*, 681 F. Supp. 408, 418 (E.D. Mich. 1988) (request for further discovery by defendant denied and summary judgment granted to plaintiff where defendant's

contention was implausible and the requested discovery would therefore have been futile).

With respect to the material on page 15 n.2 of the Brief of Respondent, Comcast refers the Court to the following additional authorities:

In the Matter of the Petition of Concentric Network Corp., State of New York, Tax App. Trib., Dec. No. DTA 819533, p. 11, *available at* <http://www.nysdta.org/Decisions/819533.dec.htm> (“It would be hard to imagine a communications activity more imbued with interstate and international characteristics than the use of the internet.”); *In the Matter of the Petition of Fastnet Corp.*, State of New York, Tax App. Trib., Dec. No. DTA 819632, p. 13, *available at* <http://www.nysdta.org/Decisions/819632.dec.htm> (same); and *In the Matter of the Petition of Frontline Comm. Corp.*, State of New York, Tax App. Trib., Dec. No. DTA 819786, p. 10, *available at* <http://www.nysdta.org/Decisions/819786.dec.htm> (same).

With respect to the material on pages 26-27 of the Brief of Respondent, Comcast refers the Court to the following additional authority:

City of Tacoma v. Mary Kay, Inc., 117 Wn. App

111, 115, 70 P.3d 144, 146 (2003) (Tacoma municipal code cannot confer jurisdiction on superior court).

With respect to the material on pages 26-27 of the Brief of Respondent and pages 9-11 of the Reply Brief of Appellant, Comcast refers the Court to the following additional authority:

Byram v. Thurston County, 141 Wash. 28, 36-37, 251 P. 103, 107 (1926), *modified on other grounds*, 252 P. 943 (1927) (“As the payment was not voluntary but made under compulsion, no statutory authority was essential to enable or require the county to refund the money. It is well settled rule that ‘money got through imposition’ may be recovered back; and as this court has said on several occasions, ‘the obligation to do justice rests upon all persons, natural and artificial, and if the county obtains the money or property of others without authority, the law, independent of any statute, will compel restitution or compensation.’”) (quoting *Ward v. Love County*, 253 U.S. 17, 24, 40 S. Ct. 419, 422, 64 L. Ed. 751, 759 (1920) (citations omitted)).

With respect to the material on pages 32 to 36 of the Brief of Respondent and pages 19 and 20 of the Reply Brief of Appellant, Comcast refers the Court to the following additional authority:

U.S. Government Accountability Office,

Internet Access Tax Moratorium: Revenue Aspects Will Vary By State, 24 (2006), *available at* <http://www.gao.gov/new.items/d06273.pdf> (“that the original 1998 act exempted telecommunications services shows that other reasonably bundled services remained part of Internet access service and, therefore, part of the moratorium. Thus, communications services such as cable modem services that are not classified as telecommunications services are included under the moratorium.”) (Emphasis added).

With respect to the material on pages 1 to 7 of the Reply Brief of Appellant, Comcast refers the Court to the following additional authorities:

Washington Department of Revenue
Determination No. 04-0022E, 23 Wash. Tax Dec. 198, 205 (2004), *available at* <http://taxpedia.dor.wa.gov/>
 (“If the services are functionally integrated, then the entire contract price is subject to tax at a single rate.”);
and Washington Department of Revenue
Determination No. 03-0170, 24 Wash. Tax Dec. 393, 396 (2005), *available at* <http://taxpedia.dor.wa.gov/>
 (“In general, with a contract not subject to bifurcation, the Department looks to the ‘primary activity’ or the

‘predominate nature’ of the activities to determine the B&O tax classification of the income.” [Citations omitted.]

With respect to the material on pages 2 to 7 of the Reply Brief of Appellant, Comcast refers the Court to the following additional authority:

Washington Department of Revenue
Determination No. 01-036, 21 Wash. Tax Dec. 13, 17 (2002), *available at* <http://taxpedia.dor.wa.gov/> (“the legislature adopted RCW 82.04.297 in response to an attempt by the City of Tacoma to treat persons who provide access to the Internet as a utility.”)

With respect to the material on pages 9 to 11 of the Reply Brief of Appellant, Comcast refers the Court to the following additional authorities:

Carillo v. City of Ocean Shores, 122 Wn. App. 592, 611-12, 94 P.3d 961, 971 (2004) (“the doctrine of equitable estoppel requires a showing that the party to be estopped (1) made an admission, statement, or act that was inconsistent with his later claim; (2) that the other party relied on it; and (3) that the other party would suffer injury if the party to be estopped were allowed to contradict or repudiate his earlier

admission, statement, or act. . . . Equitable estoppel is not favored, and the party asserting estoppel must prove each of its elements by clear, cogent, and convincing evidence;” estoppel held not to apply); and *Nolte, supra*, 122 Wn. App. at 955-57, 982 P.2d at 666 (same).

Respectfully submitted this 4th day of
October, 2006.

Davis Wright Tremaine LLP
Attorneys for Respondent

By 
Randy Gainer
WSBA No. 11823
Dirk Giseburt
WSBA No. 13949

Certificate of Service

I hereby certify that on the 4th day of October, 2006, I served a true and correct copy of the foregoing document in the above-entitled matter by causing the same to be sent by first class mail addressed to the following:

Kent C. Meyer
Assistant City Attorney
600 Fourth Avenue, Fourth Floor
P.O. Box 94769
Seattle, WA 98124-4769

The Honorable Rob McKenna
Attorney General of the State of Washington
1125 Washington Street S.E.
P. O. Box 40100
Olympia, WA 98504-0100

I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.



Denise Ratti

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